Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In the
Supreme Court of the United States

MUNIR M. UWAYDAH, M.D.

Petitioner,

v.

VAN WERT COUNTY HOSPITAL, *et. al.*

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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24 pp

QUESTIONS PRESENTED

1. Is an interlocutory Order denying a Motion to Compel Arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. § 16 timely filed over thirty (30) days from the written Order?

2. If a litigant voluntarily withdraws his first appeal, which was timely filed, at the request of the district court to issue a written Opinion on the same subject matter, should the Appellant be allowed to refile his previously dismissed appeal beyond thirty (30) days from the written decision?

PARTIES TO THE PROCEEDING

The only parties are named in the caption of this Petition. The parties are:

Petitioner: Munir M. Uwaydah, M.D. ("Dr. Uwaydah"), an individual.

Respondent: Petitioner states that Van Wert County Hospital is a non-profit organization which does business in Van Wert County, Ohio.

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IN THE
SUPREME COURT OF THE UNITED STATES

MUNIR M. UWAYDAH, M.D.

Petitioner,

v.

VAN WERT COUNTY HOSPITAL, *et al.*

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DR. MUNIR M. UWAYDAH, Petitioner, by the undersigned counsel, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The November 5, 2002 Opinion of the Sixth Circuit Court of Appeals, which judgment is sought to be reviewed is printed in Appendix A to this Petition. The Circuit Court dismissed Petitioner's appeal as being *sua sponte* untimely. The Sixth Circuit found that even though Petitioner withdrew his first appeal without prejudice so that the district court could issue a written Opinion on the same subject, which was the denial of a Motion to Arbitrate, that in a civil case the Notice of Appeal must be filed within thirty (30) days of the entry of Judgment or be untimely.

The written Decision of the United States District Court for the Northern District of Ohio (Western Division) that was to be reviewed

by the Sixth Circuit Court of Appeals is appended in Appendix B to this Petition. The District Court denied Petitioner's right to arbitrate required in the underlying contractual documents by and between the parties, primarily because the Court contended that the Petitioner waived the right to arbitrate.

JURISDICTION

The Judgment sought to be reviewed was entered by the Sixth Circuit Court of Appeals on November 5, 2002. This Judgment is set forth in Appendix A. Jurisdiction for the Sixth Circuit and District Court was invoked through the Federal Arbitration Act, 9 U.S.C. § 16 and 28 U.S.C. § 1291 *et seq.* This Court has jurisdiction to review the Judgment of the Sixth Circuit Court of Appeals under 28 U.S.C. § 1254(1).

STATUTORY AND ADMINISTRATION PROVISIONS INVOLVED

a) The Federal Arbitration Act, 9 U.S.C. § 16.

b) 28 U.S.C. § 2107.

STATEMENT OF THE CASE

A. *Nature of the Case*

This action arises from Van Wert County Hospital's failure to initiate arbitration which was required by the underlying contractual documents.

B. *Course of Proceedings And Disposition in The Courts Below*

Dr. Uwaydah requested, via Motion, an Order to stay or compel arbitration. The District Court found it had jurisdiction pursuant to 28 U.S.C. § 1332. And, the Court found that resolution of the Motion was governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* However, the Court denied the Motion, finding that the Petitioner had waived his right to arbitration.

Dr. Uwaydah filed a timely Notice of Appeal with the Sixth Circuit Court of Appeals from the Order on May 9, 2002. Shortly thereafter, however, the district court requested that the Notice of Appeal be withdrawn so that a written Opinion on the same subject could be entered. Counsel for Petitioner agreed to this request. Thereafter, the Court issued its written Opinion, which is attached hereto as Appendix B. The appeal was taken again on the same issue and the Sixth Circuit Court issued a written Opinion finding that although a first appeal on the same subject was filed and withdrawn voluntarily and without prejudice, the refiled appeal was untimely.

The basis for the interlocutory appeal was the refusal of the District Judge to issue a decision on then plaintiff Dr. Uwaydah's Motion to Compel Arbitration or to Stay the Matter pending arbitration pursuant to the Federal Arbitration Act.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT THE FEDERAL ARBITRATION ACT ALLOWS AN INTERLOCUTORY APPEAL EVEN BEYOND THIRTY (30) DAYS UNDER THE CIRCUMSTANCES OF THIS CASE.

Nothing in 9 U.S.C. § 16 requires an appeal denying a Motion to Stay and denying a Motion to Compel Arbitration must be filed within thirty (30) days from the Decision. The authorization legislation enacting the Federal Arbitration Act allows for interlocutory appeals from a District Court Decision refusing to Stay or compel arbitration. The statute does not require that the interlocutory appeal must, or should, be brought within a certain amount of time. And, nothing in the Federal Rules or, for that matter, federal common law, requires that a denial of a Motion to Stay and/or an to compel arbitration must be filed within thirty (30) days of the Order or be forever lost.

The District Court also erroneously found that the Petitioner had waived his right to arbitration. By doing so, the District Court ignored very strong federal substantive and common law decisions mandating the enforcement of arbitration agreements.

The Federal Arbitration Act requires that the parties agreement to arbitrate claims be enforced like any other agreement. Section 2 of the Federal Arbitration Act provides that:

> A written provision in any maritime transaction or contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising

> out of such contract or transaction, or the refusal to perform the hold or any part thereof, or any agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, saved upon such grounds as existed law or inequity for revocation of any contract.

9 U.S.C. § 2.

The Federal Arbitration Act was designed to "guarantee the enforcement of private contractual arrangements - the Act simply creates a body of federal substantive law establishing and regulating the duty to honor the agreement to arbitrate." *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1995) *quoting Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 n.32 (1993). The FAA was specifically enacted to "reverse the long-standing judicial hostility to arbitration and to place agreements to arbitrate 'upon the same footing as other contracts.'" *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Thus, the duty of the federal courts to enforce arbitration agreements is so fundamental that the this court has held that the FAA preempt state law that precludes arbitration. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). This Court has also stated that the public policy of the Federal Arbitration Act is extremely strong. "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve through arbitration . . . Congress has thus mandated the enforcement of arbitration agreements." *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, *Id.*

In every agreement by and amongst the parties to this Petition, arbitration was either required to be undertaken or was an implied term of the contract. Dr. Uwaydah filed his case through previous counsel in the Northern District of Ohio Western Division on the now mistaken notion that his civil rights claim, since dismissed, had to be filed in federal court and was not arbitrable. He always understood, however, that the contract claims must and should have gone to arbitration as required by the contracts drafted and revised by Van Wert County Hospital counsel.

In light of the law and strong policies supporting arbitration, this Court has routinely enforced arbitration provisions in accordance with their terms. This Court held in *Mitsubishi Motors Corp.* that federal statutory claims can and should be submitted to arbitration only absent a congressional intent to the contrary. Id. at 628. And, in *Shearson, American Express, Inc. v. McMahon*, 482 U.S. 220 (1997) this Court similarly held that agreements to arbitrate consumer claims brought under the Securities Act and Racketeer Influenced and Corrupt Organization Act ("RICO") should be enforced " in accordance with the explicit provisions of the Arbitration Act" despite the public interest in deterrence served by the availability of civil actions to enforce those statutes. Id. 482 U.S. at 238; 241-42.

Petitioner, Dr. Uwaydah, strongly believes that his right to arbitration has been wrongfully taken from him. Van Wert County Hospital drafted contracts which contained arbitration agreements and clauses. However, they ignored their own contracts; ignored any responsibility to determine with the signatory to the contract whether a related non-signatory would be willing to agree to arbitration; and then immediately filed a very damaging Complaint in Van Wert County Common Pleas Court which was the genesis of the eventual filing by Dr. Uwaydah in federal court.

A lot of work has been spent in the underlying case on procedure, not substance. And, since his federal discrimination claim

no longer exists, the parties are required to go to arbitrate the underlying contract claims.

The Sixth Circuit noted that 28 U.S.C. § 2107(a) requires that a Notice of Appeal be filed within thirty (30) days of the entry of the Judgment or Order that is being appealed. What the Sixth Circuit does not state, however, is that 28 U.S.C. § 2107 does not specifically apply to interlocutory appeals. Nor, does the statutory section state that it applies to interlocutory appeals specifically allowed under the Federal Arbitration Act.

Moreover, 28 U.S.C. § 2107 allows under Section (c) "the District Court may, upon Motion filed not later than thirty (30) days after the expiration of the time otherwise set for bringing an appeal, extend the time for appeal upon the showing of excusable neglect or good cause. In addition, if the District Court finds - -

1. That a party entitled to notice of the entry of a Judgment or Order did not receive such notice from the Clerk or any party within twenty-one (21) days of its entry; and

2. That no party would be prejudiced, the District Court may, upon Motion filed within one hundred eight (180) days after entry of the Judgment or within seven (7) days after receipt of such Notice, whichever is earlier, reopen the time for appeal for a period of fourteen (14) days from the date of entry of the Order reopening the time for appeal.[1]

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[1]The 180 days is not over and Dr. Uwaydah believes filing such a Motion, though filed, is futile based upon the litigation to date.

Here, the District Court was well aware that on May 9, 2002 the Petitioner, Dr. Uwaydah, had filed a Notice of Appeal with the Sixth Circuit Court of Appeals. Between that date and May 31, 2002, when the Sixth Circuit was requested to withdraw the interlocutory appeal without prejudice, Judge Carr of the Northern District of Ohio had requested the opportunity to present a written determination on the matter, rather than having the court reporter's transcription being the only evidence of what occurred on the subject.

The Appellant, Dr. Uwaydah, requested the opportunity to withdraw the interlocutory notice of appeal "without prejudice to any opportunity Appellant may choose to avail himself of when the District Court issues a written decision on the Motion by the Plaintiff, Dr. Uwaydah, for an Order staying resolution and compelling arbitration under The United States Arbitration Act." *See* Appendix C. The specific import of this language was meant to allow a limited period within which the District Court could enter the written decision and then the matter would be re-appealed. No one objected to this language. For all intents and purpose, there was only a few days between the time when the second Notice of Appeal was actually filed and the thirty (30) days that the Circuit Court claims bars this appeal from going forward.

So, the Petitioner essentially makes both an equitable and legal argument that the thirty (30) day rule is not absolute under 28 U.S.C. §2107 and certainly could have been waived under the circumstances, particularly since the first Notice of Appeal was withdrawn at the specific request of the District Court. More importantly, the refiling of the Notice of Appeal certainly should have and could have related back to the previously filed Notice of Appeal on the same subject matter and under the same circumstances.

It should be noted to this Court that no Sixth Circuit cases could be found directly on point holding that interlocutory appeals, pursuant to a denial of a request to stay proceedings and/or compel arbitration must be brought to the Court of Appeals within thirty (30)

days or forever be barred. And, even if there were such a controlling decision, a circumstance such as this case, where the initial appeal was timely filed which the Appellant was prepared to go forward on it, but withdrew it at the specific behest of a district court so that the Court could enter a written decision affirming its previously ordered denial, elevates only form over substance and this appeal should have been allowed to go forward.

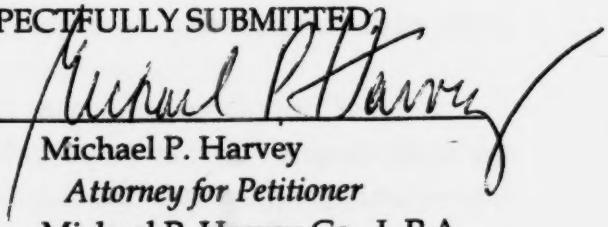
This Court should also note that this matter was not briefed at the Sixth Circuit Court of Appeals because the matter was handled procedurally by the panel. The only item that was filed with the Court was an October 2, 2002 letter through Leonard Green, the Clerk of the United States Court of Appeals for the Sixth Circuit which is appended as Appendix D.

This Court has always stated that there is a liberal federal policy favoring arbitration agreements notwithstanding any state substantive or procedural policies to the contrary. *Moses H. Cohn Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1993) And, this Court has also held that "the FAA establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself, or an allegation of waiver, delay, or like defense to arbitability." *Moses H. Cohn Memorial Hospital*, 460 U.S. at 24-25. This Court has also stated that lower courts must "rigorously enforce" written arbitration agreements. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1995). As the *Dean Witter* Court further stated "the Federal Arbitration Act leaves no place for the exercise of discretion by a district court, but instead mandates that a district court shall direct the party to proceed to arbitration on issues as to which an arbitration agreement has been signed." 470 U.S. at 218. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (holding statutory and non-statutory claims arbitrable under the FAA).]

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant its Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

RESPECTFULLY SUBMITTED,

By: 

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APPENDICES

APPENDIX A

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LEONARD GREEN, Clerk

United States Court of Appeals for the Sixth Circuit

No. 02-3990

MUNIR M. UWAYDAH, M.D.
Plaintiff-Appellant,

v.

VAN WERT COUNTY HOSPITAL; MARK J. MINICK
Defendant-Appellee

Decided: November 5, 2002

Before: MERRITT, NELSON, and GILMAN, Circuit Judges.

The Plaintiff and the defendant, Van Wert County Hospital, entered a medical services agreement which included an arbitration provision. The defendant brought an action in state court for repayment of advanced compensation. That action was dismissed when the parties agreed to arbitration. Thereafter, the plaintiff commenced the instant lawsuit. Since the commencement of this suit, the district court has granted partial summary judgment to the

defendant and informally addressed several discovery disputes. During the course of one discovery dispute, over a year after the suit had been initiated, the plaintiff sought arbitration of the action. The district court orally advised the parties that the request for arbitration would be denied. Thereafter, the court issued a written order setting a due date for discovery.

The plaintiff filed a notice of appeal from that order, which was docketed in this court as Case No. 02-3561, and asserted that the appeal was from the denial of his request for arbitration. He later moved withdraw that appeal, "without prejudice to any opportunity the Appellant may choose to avail himself of when the District Court issues a written decision on the Motion by the Plaintiff . . . for an Order Staying Resolution and Compelling Arbitration. . . " An order was entered granting voluntary dismissal of that appeal pursuant to Fed. R. App. P. 42.

Subsequently, the district court entered an order that denied the plaintiff's motion for arbitration. That order was filed and entered on the docket on June 24, 2002. On August 19, 2002, 56 days after the

entry of the order, the plaintiff filed a notice of appeal. An order was issued requesting the plaintiff to state why this appeal should not be dismissed as untimely.

In response, the plaintiff argues 1) he withdrew his first appeal to allow the district court time to issue a written opinion on the arbitration issue; 2) the provision of the Arbitration Act, 9 U.S.C. § 16, which authorizes an appeal from the denial of a motion to arbitrate, does not set a time for appeal; 3) nothing in the federal rules suggests that an interlocutory appeal must be filed within thirty days of the order; and 4) there is no Sixth Circuit authority on pont. The plaintiff suggests that he should be permitted to reopen his previously dismissed appeal.

In a civil case, the notice of appeal must be filed within 30 days of the entry of the judgment or order that is being appealed. Fed. R. App. P.4(a)(1)(A); *see also* 28 U.S.C. 2107(a). The time limits of this rule are mandatory and jurisdictional prerequisites which this court cannot waive or extend. *Budinich v. becton Dickinson & Co.*, 486 U.S. 196, 203 (1988). The rule and statute setting the time limits for a notice of

appeal refer broadly to a judgment or order. In turn, a judgment "includes a decree and any order form which an appeal lies." Fed. R. Civ. P. 54(b). We find nothing within the statute or rules that would exclude an appeal under 9 U.S.C. § 16 from the usual parameters for a civil appeal. Further, the plaintiff's withdrawal of his first appeal without prejudice did not reserve him the right to bring an untimely appeal from a later order.

Upon consideration, this appeal is **DISMISSED** *sua sponte* as untimely.

/s/ Leonard Green
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Munir M. Uwaydah, Case No. 3:00CV7640

Plaintiff,

v. ORDER

Van Wert County Hospital, *et al.*

Defendants.

Pending is a motion by the plaintiff, Munir M. Uwaydah, to stay or to compel arbitration. This court has jurisdiction pursuant to 28 U.S.C. § 1332. Resolution of this motion is governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* For the following reasons, plaintiff's motion shall be denied.

Plaintiff's request for sanctions pursuant to Fed. R. Civ. P. 11 shall be denied, without prejudice to renew.

BACKGROUND

This dispute arises from a medical services agreement (the "Agreement") between plaintiff, a medical doctor, and defendant Van Weft Hospital (the "Hospital"). The Agreement contains an arbitration provision:

> Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in the City of Toledo, Ohio, in accordance with the commercial arbitration rules of the American Arbitration Association. Such decision shall be

> binding upon the parties, and judgement [sic] upon the award rendered may be entered by any court having jurisdiction thereof.

(Doc. 70, Ex. A at 9).

In March, 2000, the Hospital fled suit against plaintiff in state court, alleging breach of the Agreement based on, among other things, plaintiff's failure to repay $412,244.51 in advanced compensation paid by the Hospital. The lawsuit was dismissed after it was filed with the parties agreed to arbitration.

On October 13, 2000,plaintiff filed suit in this court, and on January 17, 2001, the Hospital filed a counterclaim. Plaintiff made no mention of any desire or right to arbitrate in his complaint.

On July 31, 2001, plaintiff filed an amended complaint against the hospital, asserting diversity jurisdiction and alleging state tort claims.[2] Once again, plaintiff made no mention of any desire or right to arbitrate.

Since the filing of this action, recurrent discovery disputes have arisen between the parties, who, in accordance with our local rules and practice, called on me to resolve those disputes informally without the necessity of a formal motion to compel.[3] There have been

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[2]Plaintiff based his original complaint on federal question jurisdiction. By an order of June 6, 2001, this court granted defendants' motion for partial summary judgment and dismissed plaintiff's federal claims. By the same order, this court refused to exercise jurisdiction over plaintiff's remaining state law claims and dismissed those claims as well. Plaintiff filed a motion for relief from this order and an amended complaint asserting diversity jurisdiction.

[3]The purpose of requiring counsel to contact the court to seek information resolution of discovery disputes, which, in

at least three such discovery conferences. In addition, I was asked to review purportedly confidential documents in camera, and have issued two discovery orders. In additional, I have ruled on a motion for partial summary judgment.

After eighteen months of litigation before this court, plaintiff, citing the Agreement's arbitration clause, asserted – for the first time – his pending demand for arbitration. The Hospital opposes plaintiff's demand, arguing that plaintiff long ago waived any right to ask for arbitration. I find the Hospital's argument well-taken, and hold that plaintiff's institution, maintenance, and participation in this case manifested a clear and unequivocal waiver of any right to arbitrate that otherwise might have been available under the Agreement.

DISCUSSION

Through the Arbitration Act, Congress has declared a national policy favoring arbitration and a strong presumption favoring arbitrability. See Ferro Corp. v. Garrison Indus., Inc., 142 F.3d 926, 932 (6th Cir. 1998); Siam Feather & Forest Prods. Co., Inc. v. Midwest Feather Co., Inc., 503 F. Supp. 239, 241 (S.D. Ohio 1980), aff'd, 663 F.2d 1073 (1981) (Table). As the Sixth Circuit noted in Liskey v. Oppenheimer & Co., Inc., 717 F.2d 314, 391 (6th Cir. 1983) (quoting Cunningham v. Dean Witter Reynolds, Inc., 550 F. Supp. 578, 584 (E.D. Cal. 1982)), "The policy Congress intended to effectuate [through arbitration] was to avoid unnecessary expense and delay of litigation where parties had provided for the more efficient process of arbitration . . . ."

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all likelihood, is not available in an arbitration proceedings, results in a very substantial saving of time for the court and counsel, and of money for the litigants, because in almost no instance, except where a bona fide claim of privilege is being asserted, does such informal process fail to resolve the discovery dispute.

Nonetheless, a party may waive its contractual right to arbitration as it can waive any other contractual provision. See Germany v. The River Terminal Ry. Co., 477 F.2d 546 (6th Cir. 1973); American Locomotive Co. v. Gyro Process Co., 185 F.2d 316, 318 (6th Cir. 1950); Southern Sys., Inc. v. Torrid Oven Ltd., 105 F. Supp. 2d 848, 825 (W.D. Tenn. 2000); The Central Trust Co. v. Anemostat Prods. Div., 621 F. Supp. 44, 46 (S.D. Ohio 1985); Sam Feather, 503 F. Supp. at 242.

A waiver of the right to arbitrate may be expressed or implied. An implied waiver occurs "when the party actively participates in litigation or acts inconsistently with its right to proceed with arbitration." Siam Feather, 503 F. Supp. at 242 (citing American Locomotive Co., 185 F.2d 316). While there is no bright-line rule as to what constitutes waiver, "[c]onduct such as filing responsive pleadings while not asserting a right to arbitration, filing a counterclaim, filing pretrial motions, engaging in extensive discovery, use of discovery methods unavailable in arbitration, and litigation of issues on the merit have all been considered by courts to amount to a waiver of the right to arbitration." Southern Sys., Inc., 105 F. Supp. 2d at 854.

Here, the record amply supports the conclusion that plaintiff impliedly waive d his right to arbitration by instituting and actively participating in this litigation and thereafter acting inconsistently with regard to any right to arbitrate he may have had. Without first seeking to assert a demand for arbitration, though the parties had agreed to do so shortly after the Hospital's state court suit had been dismissed, plaintiff filed the present lawsuit, [4] amend his complaint,

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[4]One court has noted:

> The filing of a complaint is notice to a defendant that the plaintiff is refusing to arbitrate. At that point, or within a reasonable time thereafter, defendant must decide whether

engaged in extensive discovery, used discovery methods unavailable in arbitration, participated in several discovery conferences with the court, responded to defendants' counterclaim and motion for partial summary judgment, and was provided with the court's rulings on various matters.

Both the parties and this court have expended much time and substantial resources on this matter for the past eighteen months. But for plaintiff's demand for arbitration, he would, after providing some additional discovery that he has been ordered over his objections to provide, have had to file a response to defendant's pending motion for summary judgment. This case, in other words, is on the brink of resolution either by dispositive motion or trial, which, pursuant to an order entered on October 11, 2001, had been set for September 3, 2002.[5]

In Cabintree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390 (7th Cir. 1995), the Seventh Circuit held that the el3ection to proceed in a nonarbitrable forum acts as a "presumptive waiver" of

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> to proceed to trial or invoke Sections 3 or 4 of the Arbitration Act.
>
> The Central Trust Co. v. Anemostat Prods. Div., 621 F. Supp. 44, 46 (S.D. Ohio 1985).

Plaintiff's actions strongly suggest that he originally chose to proceed to litigate, rather than arbitrate, and now seeks to change his mind after an unreasonable amount of time and rulings adverse to his claims.

[5]Earlier trial dates (January 8, 2002 and May 21, 2002, had been vacated, principally due to delays caused by discovery disputes). Until plaintiff filed his demand for arbitration, there was no reason to believe that the case, assuming defendant's summary judgment motion were to have been overruled, would not have proceeded to trial. There can be little doubt, in my view, that judicial disposition of the parties; dispute would have been accomplished well before the arbitration process would have been completed.

the right to arbitrate. In that case, the court held that a party's decision to proceed in federal court without also seeking arbitration constituted an election to proceed in a nonarbitrable forum and, therefore, created a presumption of waiver. Id.; see also American Locomotive, 185 F.2d at 320 (stating that the filing of an action in a nonarbitrable forum is notice that the party is refusing to arbitrate the dispute under an arbitration provision); Worldsource Coil Coating, Inc. v. McGraw Constr. Co., Inc., 946 F.2d 473, 478 (6th Cir. 1991) ("unless authorized by contract, submission of arbitrable issues in a judicial proceeding constitutes a waiver of the right to compel arbitration regardless of the prejudice to the other party.") ("analyzing Illinois law).

Here, plaintiff's choice of this forum was not limited to seeking to enforce the arbitration clause in the Agreement. See American Locomotive, 185 F.2d at 320 (noting that a party can proceed under 9 U.S.C. § 4 for specific performance of an arbitration provision). Indeed, there is no indication that defendant would have refused a timely request to arbitrate. To be sure, it had filed suit in state court, but it had also acquiesced in an agreement to arbitrate and dismissal of that action.

In response to the Hospital's claim of waver of the right to arbitrate, plaintiff asserts: 1) without a showing that defendant has incurred prejudice from plaintiff's failure to make a timely demand for arbitration, waiver cannot occur; and 2) pretrial expense and delay, without more, do not constitute prejudice sufficient to support waiver. Plaintiff cites several cases from other circuits in support of this argument. See Leadertex, Inc Morganton Dyeing & Finishing Corp., 67 F.3d 20 (2d Cir. 1995) ("[P]retrial expense and delay - unfortunately inherent in litigation - without more, do not constitute prejudice sufficient to support a finding of waiver."); Rush v. Oppenheimer, 779 F.2d 885, 887 (2d. Cir. 1985) ("[W]aiver of the right to compel arbitration due to participation in litigation may be found only when prejudice to the other party is demonstrated."); Painewebber, Inc. v. Fragalli, 61 F.3d 1063, 1069 (3d Cir. 1995) ("Prejudice is the touchstone for determining whether the right to arbitration has been waived.");

Britton v. Co-op Banking Group, 916 F.2d 1405, 1412 (9th Cir. 1990); Fisher v. A.G. Becker Paribas, Inc., 791 F.2d 691, 694 (9th Cir. 1986) (adopting a three prong test for determining waiver: 1) knowledge of an existing right to compel arbitration; 2) acts inconsistent with that right; and 2) prejudice to the opposing party resulting from the inconsistent acts).

In addressing plaintiff's first contention, that prejudice is determinative of waiver, it appears that not all of the courts agree with plaintiff's contention that a party opposing an untimely arbitration demand must show prejudice of the demand to be overruled. In other circuits, prejudice is a factor, but is not dispositive. See Cabintree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388, 390 (7th Cir. 1995) ("To establish a waiver of the contractual right to arbitrate, a party need not show that it would be prejudiced if the stay were granted and arbitration ensued."); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482, 1489 (10th Cir. 1994) (listing prejudice as one of six factors to examine in determining whether a party has waiver); National Found. For Cancer Research v. A.G. Edwards & Sons, Inc., 821 F.2d 772, 777 (D.C. Cir. 1987) ("This circuit has never included prejudice as a separate and independent element of the showing necessary to demonstrate waiver of the right to arbitration.").

The Sixth Circuit does not appear to have resolved the issue of the extent to which prejudice to the opponent of arbitration must be shown. In American Locomotive, the court, making no mention of prejudice, noted that at the time of the filing of the complaint, or a reasonable time thereafter, the party seeking arbitration could have and should have made the decision to insist on arbitration or prepare for trail. 185 F.2d at 320. In Germany v. River Terminal Ry. Co., the court, likewise making no mention of prejudice, stated "[a]n agreement to arbitrate may be waived by the actions of a party which are completely inconsistent with any reliance thereon." 477 F,2d 546, 547 (6th Cir. 1973). In an unreported decision, the court noted that "[p]rejudice to the opposing party is a significant fact" in determining

waiver. Mantaline Corp. v. PPG Indus., Inc., No. 97-4473, 2000 U.S. App. LEXIS 14036, at * 13 (June 8, 2000). Although the court has also stated "a party may waive the right [to arbitration] by delaying its assertion to such an extent that the opposing party incurs actual prejudice," General Star Nat'l Ins. Co. v. Administratia Asigurarilor De Stat, 289 F.3d 434 (6th Cir. 2002), the court's decisions, on balance can most fairly be read as recognizing prejudice as a factor, but not solely dispositive. See Southern Systems, 105 F. Supp. 2d at 853 (citing American Locomotive, 185 F.2d at 318).

Other district courts in this circuit have likewise treated prejudice as a favor in determining waiver, but not as the exclusive factor. Id.; see also I. Wise Smith & Assoc., Inc. v. Nationwide Mut. Ins. Co., 925 F. Supp. 528, 531 (W.D. Tenn. 1995); In re H & M Charters, Inc. & Reed, 757 F. Supp. 859, 865 (S.D. Ohio 1991); Siam Feather, 503 F. Supp. at 243. Thus, I will treat the issue of prejudice as a factor, but not as an exclusive factor in determining waiver.

Plaintiff, citing Leadertex 67 F.3d at 26, argues that pretrial expenses and delay, without more, are insufficient to establish prejudice. The facts in this case, however are readily distinguishable from the facts present in this case. In Leadertex, the defendant sought arbitration after only eight months of litigation, not the eighteen months present in this case. Additionally, the party opposing arbitration had not engaged in extensive discovery, as that party had evaded discovery by producing a few documents, giving unresponsive answers to interrogatories, and failing to produce witnesses for scheduled depositions. Here, the parties have engaged in extensive discovery and protracted discovery.

The circumstances of this case likewise differ from the other cases on which plaintiff relies for his contention that a showing of prejudice requires more than a showing that time and money have been spent in litigation before the demand for arbitration was made. In Rush, 779 F.2d 885, arbitration was demanded after suit had been pending for only eight months - not after eighteen months, as here.

Both Rush and Fisher, 791 F.2d 691, involved federal securities actions, which raised nonarbitrable claims. Discovery in those cases related to the nonarbitrable claims. Here, there are no nonarbitrable claims between the parties. Finally, in both Painewebber, , 61 F.3d 1063, and Britton, 916 F.2d 1405, the parties had engaged in no discovery before arbitration was sought.

This case is , however, analogous to Southern Systems, 105 F. Supp. 2d 848. In Southern Systems, the court found a waiver of the right where the party seeking arbitration had: filed its motion to stay only a month before the discovery deadline and after extensive discovery had taken place; invoiced the court's assistance in compelling discovery; obtained discovery not available in arbitration;[6] and filed a motion to dismiss and counterclaim – all before raising the issues of arbitration. In determining waiver, with [defendant] having the benefit of eighteen months of pretrial proceedings in this court, would clearly result in substantial prejudice to plaintiff." Id. at 856.

As in Southern Systems, a period of eighteen months passed before plaintiff invoked any arbitration rights. During that period, the Hospital has had to respond to plaintiff's complaint and motions, and has become involved in extensive, protracted, and expensive discovery proceedings. Plaintiff has invoked this court's assistance in discovery matters, including a motion to compel, discovery conferences and in camera review of Hospital documents. Moreover, plaintiff filed his motion after this court issued an order compelling discovery from plaintiff and shortly before summary judgment proceedings.

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[6]The court noted that the Federal Rules of Civil Procedure are more liberal with regard to discovery than those of the American Arbitration Association. Southern Systems, 105 F. Supp. 2d at 856 n.7.

Forcing arbitration at this point would only result in further delay, greatly increased expense, and substantial prejudice on the part of the Hospital. See Central Trust Co., 621 F. Supp. at 46 ("To dismiss the action or force the parties into arbitration now would further delay a case that has already been pending almost 19 months.") Thus, aside from the other prejudice incurred thus far, the Hospital would incur even greater prejudice from the additional expense and delay that proceeding to arbitration would entail.

Through his demand for arbitration, plaintiff claims to be seeking prompt resolution of his dispute with the Hospital. There is no permit to his shallow and insincere protestations: his motion is the quintessential delaying tactic and effort at forum-shopping.

Plaintiff, having at the eleventh hour retained his fifth attorney,[7] is stalling. He fears and wants to avoid, rather than seeks and desires, prompt adjudication. Because he is entitled to an interlocutory appeal from a decision denying a demand for arbitration, 9 U.S.C. § 16(a)(1)(A), no matter how untimely or manipulative such appeal may be, plaintiff seeks to gain that which he claims not to want - postponement of an adjudication of his claims on their merits.

There is no other reasonable interpretation, in light of the protracted procedural history of this case, of plaintiff's untimely demand for arbitration than to view it as a deliberate tactic employed to foreclose, for two years or more (given the workload and manpower (and womanpower) shortage of our Circuit court), a final decision in this case.

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[7]Plaintiff has used five different attorneys to represent him in his dispute with the Hospital. His first attorney was Charles Kennedy of Van Wert, William Case took over the Van Wert County Case. Charles, Murray, Timothy Sprague, and Michael Harvey have all represented plaintiff in this court.

To require the Hospital to submit to arbitration at this point would be to make a mockery of the purposes - prompt resolution of disputes without the inconvenience, expense, delay, and uncertainty o litigation – arbitration. Granting plaintiff's motion would nothing useful, while causing greater inconvenience, more expense, further delay and continued uncertainty. It would, moreover, cause the extensive work of this court on this case to have been largely, if not entirely wasted.[8]

If plaintiff's demand for arbitration were to be upheld, there would be nothing to keep any litigant with an arbitration clause from testing the judicial waters, and to do so for as long as he liked, even to the point where the case has arrived on the brink of resolution, and then nullifying all that has gone before by demanding arbitration. If that is what a deliberately delayed demand for arbitration can do, then all that is bad about litigation – including most particularly unnecessary delay, wasteful expense, and the manipulative impulse to forum-shop - would be fostered, rather than deterred.

I am firmly persuaded that neither the Arbitration Act nor sound common sense would or does countenance such an absurd distortion of the arbitration process. Plaintiff's untimely motion to stay and compel arbitration shall be denied.

Defendant understandably demands that sanctions be imposed under Fed. R. Civ. P. 11. That motion will be denied, without prejudice to renew following the Sixth Circuit's decision on appeal.

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[8]The time taken on this case would have needlessly been taken from the other cases on my docket. Not only would plaintiff's demand, if granted, have the effect of causing delay in the resolution of this case, it would have also caused delay in the adjudication of the cases of other litigations, who want and deserve prompt resolution of their lawsuits.

Whether or not that court imposes sanctions under Fed. R. App. P. 38,[9] I will entertain plaintiff's renewed motion when this case is, as seems likely, remanded for further proceedings before this court.

Plaintiff can avoid the risk of sanctions under Fed. R. Civ. P. 11 and Fed. R. App. P. 38 if he accepts this denial of his untimely and unjustified demand for arbitration by declining to seek interlocutory review of this order, and, instead, complies with the discovery that, pursuant to prior order, he owes, and thereafter files his opposition to defendant's pending motion for summary judgement. This will bring him, either by ruling on that motion, or trial in early September, a far speedier resolution of this protracted dispute than either an appeal from this order or recourse to arbitration.

That is his decision to make. For now, mine simply is to deny plaintiff's unfounded demand for arbitration on the basis that his actions for the past eighteen months have been completely inconsistent with any right to arbitration that he might otherwise have enjoyed.

CONCLUSION

It is, therefore,

ORDERED THAT

Plaintiff's Motion for stay or to compel arbitration be, and hereby is, denied.

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[9]Fed R. App. P. 38 states:

> If a court determines that an appeal is frivolous, it may, after a separately filed motion or notice form the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

So ordered.

/s/ James G. Carr

APPENDIX C

CASE NO. 02-3561

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MUNIR UWAYDAH, M.D.
Plaintiff-Appellant,

v.

VAN WERT COUNTY HOSPITAL, *et al.*
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Ohio
Western Division

REQUEST TO WITHDRAW INTERLOCUTORY APPEAL WITHOUT PREJUDICE

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Attorney for Plaintiff-Appellant
Munir Uwaydah, M.D.

The Appellant, Munir Uwaydah, M.D., respectfully requests the opportunity to withdraw the Interlocutory Notice of Appeal filed on May 9, 2002 without prejudice to any opportunities the Appellant may choose to avail himself if and when the district court issues a written decision on the underlying request by the Plaintiff in the underlying case, Dr. Uwaydah, for an Order staying and compelling arbitration.

Respectfully submitted,

Michael P. Harvey, Esq.
MICHAEL P. HARVEY CO. L.P.A.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one copy of the foregoing Appellant's Request to Withdraw Interlocutory Appeal was served, via ordinary U.S. mail, upon the following counsel of record:

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via regular U.S. mail, postage prepaid, this _____ day of May, 2002.

_____

Michael P. Harvey, Esq.
MICHAEL P. HARVEY CO. L.P.A.

APPENDIX D

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October 2, 2002

Leonard Green, Clerk
United States Court of Appeals
for the Sixth Circuit
532 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, Ohio 45202-3988

Re: ***Munir Uwaydah, M.D. v.***
Van Wert County Hospital, et al.
Sixth Circuit Court of Appeals Case No. 02-3990

Dear Mr. Green:

On or about September 17, 2002 you sent me an Order pursuant to Appellate Rule 45 requesting in writing within twenty-one (21) days the reasons why the appeal should not be dismissed for lack of a timely notice of appeal.

First, Appellant withdrew the initial notice of appeal in Case No. 02-3561 at the specific request of District Court Judge Carr who requested an opportunity to write a formal written opinion on the subject matter of the initial interlocutory appeal rather than relying solely upon the April 29, 2002 transcript

decision of a pretrial on the same subject. The Appellant agreed to this oral request, knowing full well that the Court intended to confirm the earlier decision which, in fact, the Court did. Therefore, Appeal Number 02-3990 is the District Court's written affirmation of the April 29, 2002 decision which relates back to the initial filed appeal which, of course, was timely filed and not dismissed with prejudice.

Second, the authorizing legislation of the Uniform Federal Arbitration Act allows for interlocutory appeals from a District Court decision on the subject matter. It does not state that such an appeal must, or should be, brought within a certain period of time.

Third, neither Federal Appellate Rule 4 nor anything else in that Rule states that a notice of interlocutory appeal must be filed within thirty (30) days of an entry of a Judgment or Order.

Fourth, there are no Sixth Circuit cases directly on point holding that interlocutory appeals, pursuant to a denial of a request to stay proceedings and/or compel arbitration, must be brought within thirty (30) days. And, even if there were such a decision, a circumstance such as this where the initial appeal was timely filed and the Appellant was prepared to go forward on it, but withdrew it at the request of the District Judge so that the Court could enter a written decision affirming the previously filed denial, elevates form over substance.

The Appellant is fully prepared to brief this subject as part of the Appellate process. However, the main point of this letter, in response to the Court's request, is that the Appellant had every intention of dismissing the initial appeal without prejudice for the sole reason of allowing the Court to enter its subsequent written Order on the same subject reaching the same decision, except with written analysis. Quite possibly, what the Appellant would suggest is that we discuss refiling Appeal No. 02-3561, since that would certainly obviate this procedural difficulty.

In any event, the Appellant renews his request here, as he has done in the Notice of Appeal and related materials, that the Sixth Circuit take jurisdiction over this question of whether the Appellant's right to arbitrate contained in the written agreements between the parties should have been honored by the District Court and, for that matter, the Appellee, Van Wert County Hospital right along, and whether that right to arbitrate was waived under the particular circumstances of the case that this counsel finds as he has taken this case over from Attorney Timothy Sprague.

Sincerely,

MICHAEL P. HARVEY CO., L.P.A.

By_____
Michael P. Harvey, Esq.

MPH/tab

cc: C. Philip Baither, III, Esq. (via regular U.S. mail)
James L. Rogers, Esq. (via regular U.S. mail)
Ted Kurt, Esq. (via regular U.S. mail)
Gerald Kowalski, Esq. (via regular U.S. mail)
Gary O. Sommer, Esq. (via regular U.S. mail)
Joe Saponaro (via e-mail only)